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ABSTRACT

This analysis of government regulation of America's broadcast service provides: (1) a historical view of radio and television regulation, including the doctrines of scarcity and public trustee and other areas affected by deregulation in particular; (2) an analysis of the argument for deregulation; and (3) an assessment of the First Amendment, the public interest standard, and content regulation. The major goal of the analysis is to determine the degree to which deregulation accommodates the contemporary American broadcast marketplace including both broadcasters and the public. It concludes that: (1) deregulation is likely to be beneficial to both broadcasters and the public in terms of greater program flexibility and innovation, and in reducing unnecessary economic burdens; (2) broadcasters will still be subject to comparative applications and renewals, as well as other statutory rules still in force, which may result in very little change; and (3) little progress has been made on the crucial issue of full First Amendment rights. (28 end notes) (CGD)

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The Deregulation of U.S. Communication Policy

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The history of broadcasting service in America is one based on government regulation. Airwaves have traditionally been viewed as a public resource, available to individuals but subject to necessary rules for orderly and efficient use. The 1970's and 80's have brought a relaxation of such regulation, with government rules being deregulated or relaxed. In the major steps, radio was deregulated in 1981¹ and television in 1984.² The result has been a major shift in U.S. communications policy. Communication services that were once monopolies or reserved for the exclusive use of licensed operators are now opened to marketplace competition. Exclusive rights to part of the broadcast spectrum will no longer be granted strictly by government. Instead they will go to the highest bidder proposing a desired program service.

The assumption behind this approach is that a robust, efficient market will arise for communication services which will adequately serve the public interest. Technology will provide alternative outlets for entertainment and information so that government monitoring will no longer be needed.

This paper analyzes deregulation according to the following structure: first, a historical view of radio and television regulation, including the doctrines and areas affected by deregulation is particular; second, an analysis of the argument for deregulation; and third, an assessment of the first amendment and content regulation. The major goal is to analyze the degree to which deregulation accommodates the contemporary American broadcast marketplace including both broadcasters and the public.

Regulation: A Background

Early Regulatory History

To understand both the need for regulation of the airwaves and the push to deregulate requires an understanding of the phenomenon of airwave "scarcity." The scarcity approach to broadcast regulation dates to the beginning of radio regulation in the United States in the early 1900's. Government regulation of radio broadcasting developed out of the congestion in ship-to-shore and ship-to-ship communications. Congress, reacting to the scarcity of broadcast frequencies, enacted the Radio Act of 1912 which prohibited operation of radio equipment without a license from the Secretary of Commerce and Labor.³ However, the Commerce Department could not discriminate between applicants,⁴ a situation that resulted in a chaos of broadcast interference by the early 1920's.

The Scarcity Doctrine

In response to the problem, Congress wrote the Radio Act of 1927. Its powers were transferred to the Communications Act of 1934 under the administration of the Federal Communications Commission (FCC).⁵ The Act empowered the Commission to license radio stations in the "public interest, convenience and necessity," and to provide a "fair, efficient, and equitable distribution of radio service" to the United States.⁶ The U.S. Supreme Court, which approved the licensing scheme, observed that radio frequencies are limited,

they are not available to all who may wish to use them;
the radio spectrum simply is not large enough to
accommodate everybody. There is a fixed natural

limitation upon the number of stations that can operate without interfering with one another.⁷

The Public Trustee Doctrine

Building on the scarcity approach, the FCC developed several complimentary ideas to guide the broadcast industry. Most prominent was the notion that licensees were trustees of the frequencies they were allowed to use. Thus the public interest in the proper allocation of the airwaves was considered to supersede any individual users interest. Private monopolization of the airwaves was viewed as being contrary to the best interests of the nation. This in turn relates to a fundamental assertion of the Communications Act -- that electromagnetic frequencies used for communication cannot be privately "owned." Section 301 of the Act states:

It is the purpose... to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right beyond the terms, conditions, and periods of the license.

Thus Congress made plain its intention: the radio frequencies were public property and accordingly were to be operated in the public interest. The government could decide not only who was to be licensed to use the electromagnetic spectrum, but whether a licensee would be entitled to continue to use it after the initial grant.

The FCC sought to protect the public interest by limiting competition in broadcasting and telecommunications. The Commission established the "7-7-7"

rule which restricted one licensee to seven AM, seven FM, and seven television frequencies (Five VHF - two UHF). Licenses were granted for three years. At the end of that period the FCC renewed them if the licensee could satisfy the Commission that it had served the public interest.

Programming Policies --

In 1946, the FCC issued its first statement explaining the program criteria licensees should meet. The report, called the Blue Book, indicated that local talent programs, discussions of public issues, programs covering religious, civic and educational matters, local news and market reports had to be included in the licensees programming.⁸

In 1960, the FCC issued a new report which reiterated the policies set forth in the Blue Book and which listed "the major elements usually necessary to meet the public interest, needs and desires of the community."⁹ These elements are (1) opportunity for local self-expression, (2) development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public-affairs programs, (7) editorializing by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programs. The Commission stated that the Report "did not intend to guide the licensee along the path of programming," and that it would set up no quantitative standards.¹⁰

Several elements mentioned in the 1960 Report refer to local relevance-- local self-expression and local talent. In addition, the usefulness of news, weather, educational and similar programming depends largely on their local relevance. In fact, the FCC stated:

...the principal ingredient of the licensee's obligation to operate his station in the public interest is the

diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service.¹¹

Ascertainment

Another important element of the 1960 Report was the requirement that stations ascertain the needs of their community. Ascertainment was supposed to be the way for a station to factor the fourteen major elements into their program service. In 1971, the FCC published a list of guidelines to enable broadcasters to prepare initial and renewal applications that would adequately reflect community needs.

In 1981 radio ascertainment rules were removed by the FCC since it was convinced the radio marketplace had become so large that competition between stations had effectively supplanted the need for strict federal regulation. Television ascertainment rules were deregulated in 1984.

The elimination of formal ascertainment does not mean that broadcasters are free to ignore community needs. Instead, the FCC reaffirmed the continuing obligation of broadcasters to determine issues of concern, and to broadcast programming responsive to those issues. Rather than use the costly and formal ascertainment procedures once required, stations can now use less formal methods to determine the issues of the community.

Evidence so far indicates that stations remain responsive to community needs. A 1982 study found that for nine out of ten radio stations, there was no decrease in the amounts of news and public affairs programming following deregulation.¹² Also, 1985 figures shows the size of radio and TV news staffs to be the same as in 1984.¹³

The emphasis on localism is a real factor in American broadcasting, one that will require stations to be aware of the needs of their communities. Competition in the marketplace will require that stations program to those needs no matter how they are determined.

Analysis of the Argument for Deregulation

The main argument for the deregulation of American broadcasting is that it is preferable to allow the industry to regulate itself through free marketplace competition rather than through government imposed regulation. In fact, advocates of deregulation argue that, while self-regulation may not have been possible in the early years of broadcasting, the industry has grown to such an extent that self-regulation is already occurring.¹⁴

According to its supporters, self-regulation is preferable to government regulation for several reasons. First, effective self-regulation implicitly requires less government supervision.¹⁵ Secondly, since the public indicates its preference by choosing one station over another, marketplace competition by its nature better serves the public. Under the formal ascertainment required by the FCC broadcasters presented the FCC with quantitative data to indicate the extent to which they assessed community needs. The procedure took on as much importance as the programs that were actually broadcast. Thus, as FCC Chairman, Mark Fowler, has observed, "broadcasting in the United States conforms little to the model contemplated in the Commission's licensing philosophy."¹⁶

Moreover, although free competition may not have been a realistic alternative to FCC regulation in the past because of the scarcity of stations, scarcity is no longer a problem. A comparison of broadcast facilities in 1955 with 1985 shows why.

In 1955, 411 TV stations were on the air. In 1985, 1,200 full power stations were on the air along with 320 low-power stations. There were 674 FM radio stations and about 2,700 AM radio stations on the air in 1955. Now there are nearly 5,000 FM radio stations and 4,800 AM radio stations in operation.

Cable TV has also expanded. More than 200,000 subscribers are added each month. Over three-fourths of today's cable subscribers can receive at least 20 channels. About 60% can receive 30 channels or more.¹⁷ More than 40 video programming services are available to cable systems beyond the carriage of local and distant broadcast signals.

The new media provide even more outlets than broadcasting and cable. Low power TV, multipoint distribution systems, direct broadcast satellites, home satellite receiving dishes and video cassette recorders are contributing to the dramatic increase in competition for the home-viewing audience. Thus, despite the natural limitations of the broadcasting spectrum, marketplace competition has dramatically increased.

The implication of these statistics to the public interest standard in broadcasting is clear. Increased competition for the listening and viewing audience requires a greater knowledge of public needs and concerns. Furthermore, the increased specialization in programming, such as all-sports and all-weather channels on cable, and all-news radio stations, will likely cause broadcast stations to pay even closer attention to local needs to compete successfully.

Finally, it should be noted that broadcasting's competition with other media, especially television's competition with cable, involves industries that have been subject to little regulation.¹⁸ This places commercial television at a distinct competitive disadvantage since the newer technologies, including cable, are free to provide innovations. If commercial broadcasters must observe government regulations in planning their programs, this disadvantage may not be in the public interest.

Proponents of deregulation maintain that the time and effort spent complying with FCC regulations has further increased the competitive disadvantage of commercial broadcasting.¹⁹ In fact, the costs of compliance

with government regulation may have outweighed any benefits arising from regulation. This, in turn, raises another question: do broadcast content regulations restrict, rather than enhance, a broadcaster's freedom of speech? The compatibility of regulation with the first amendment is thus an important issue.

The First Amendment and the Public Interest Standard

Although the broadcast deregulation notices provide little analysis of the first amendment aspect of broadcast content regulation, the FCC Deregulation Order does acknowledge that continued government-imposed programming guidelines might eventually constitute an unacceptable level of intrusion in first amendment values.²⁰ While deregulation may move broadcasting away from that possibility, it still fails to grant broadcasters full first amendment protection.

The Supreme Court has held that the former level of content regulation did not violate the first amendment rights of broadcasters.²¹ The Court has based its position on both the scarcity doctrine and the public trustee concept of broadcasting.

The position regarding first amendment rights is clearly stated by the Court in the Red Lion case. The Court said: "The right of viewers and listeners, not the right of the broadcasters... is paramount."²² According to the Court, the right of listeners "to receive suitable access to social, political, esthetic, moral and other ideas and experiences"²³ outweigh the claims of broadcasters when the two conflict. The latter statement reflects the public trustee concept. As trustees, licensees have a fiduciary-type duty to provide certain kinds of programs. Since the frequencies are limited and access is costly, the argument holds that broadcasters must conform to content

regulations in exchange for the privilege of using broadcast frequencies. In CBS v. FCC,²⁴ the Court, relying on Red Lion, repeated its position that public access to certain communications outweighed the right of broadcasters to use the medium for a completely free expression of their own views.

Both the scarcity argument and the public trustee argument are used to support the acceptability of content regulation in broadcasting. Content regulation, in turn, theoretically insures diversity in broadcasting which is viewed as a primary goal.²⁵ Diverse programming is in the public interest.²⁶

There is now question whether content regulation, once justified due to scarcity of the airwaves, is now justified since technology has reduced that scarcity. Although broadcast frequencies are scarce in the sense that they are limited by the finite nature of the spectrum, the American public has access to more radio and television stations than ever before. Thus, the Supreme Court's scarcity argument may well be outdated.

The public trustee doctrine is also subject to question. Broadcasters, when viewed as public trustees, are required to serve the public interest by adhering to the FCC's Fairness Doctrine and other restrictions. Still, Section 326 of the Communications Act specifically forbids censorship of broadcasters, and this provision has been interpreted as the same kind of ban on censorship the print media enjoys.²⁷

The Supreme Court in CBS v. Democratic National Committee upheld a broadcaster's refusal to accept editorial advertising as violative of the first amendment. The Court held that a right-of-access by individuals wishing to discuss controversial issues would "enlarge government control over the content of broadcast discussion of public issues,"²⁸ thus sacrificing first amendment protections. It is clear from the Court's language that broadcasters do have first amendment rights to their broadcasts. But, although broadcasters have some editorial and journalistic discretion, the extent of these rights is somewhat less than that of other media.

Conclusion

Deregulation of American radio and TV is a major step forward in accommodating the changing broadcast marketplace. The marketplace is a far better indicator of public needs than any formula devised by the government and the scarcity doctrine, the cornerstone of FCC regulation, has been made obsolete by technological advances. As a result, deregulation is likely to be beneficial to both broadcasters and the public.

Deregulation should give broadcasters greater program flexibility and provide for more innovation. Commercial radio is already showing innovative specialized programming that enables the broadcaster to evaluate local concerns and program to them. Examples are stations that specialize in vacation information, weather data, and stock market information. Television, with its reliance on network programs, may be somewhat slower to offer specialized programming. Still, the possibility of another network and the specialized movie, weather, and sports channels on cable may cause TV stations to offer more innovative and specialized programs, if not changes in format. Such changes will provide the public with a greater diversity of program choice, one stimulated by the marketplace, not government regulations.

Marketplace competition for listeners and viewers should make broadcasters more alert to public needs and concerns. Satisfying the audience in the local marketplace will be the goal so broadcasters will have to be responsive to local needs. The elimination of formal ascertainment will reduce unnecessary economic burdens on broadcasters and the FCC.

Despite the potential for change brought by deregulation, broadcasters will still be subject to comparative applications and renewals, as well as other statutory rules still in force. The result is that very little may change. The FCC will still employ the same criteria in granting licenses and

renewals since it was formal program guidelines that were deregulated. Broadcasters have always lived in fear of losing their licenses and adherence to FCC regulations has provided a fairly predictable framework within which renewal could be expected. Even though some of the FCC rules have been deregulated, all have not been and broadcasters may well take the predictable path of following FCC guidelines, past and present.

While deregulation is a major accommodation of the changing broadcast marketplace, little progress has been made on the crucial issue of full first amendment rights. Until program content is completely removed as a condition for the granting of licenses, indeed until the chilling presence of government regulation is removed, broadcasters will never have the full first amendment rights enjoyed by the rest of the press.

Notes

1. Notice of Inquiry and Proposed Rulemaking in the Matter of Deregulation of Radio. 73 F.C.C. 2d 457 September 27, 1979. 84 F.C.C. 2d 968, recon. denied, 87 F.C.C. 2d 797 (1981).
2. Report and Order in the Matter of the Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670 (August 21, 1984).
3. Ch. 287, 37 Stat. 302 (1912).
4. Judicial limitations were imposed on the Secretary of Commerce when he attempted to limit the number of stations. See *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923); *United States v. Zenith Radio Corp.*, 12 F. 2d 614 (N.D. Ill. 1926).
5. Ch. 169, 44 Stat. 1162 (1927), repealed by the Communications Act of 1934, Ch. 652, 6 Stat. 602 (a), 48 Stat. 1064, 1102.
6. 47 U.S.C. Sections 303, 307 (a), 307 (b) 1976.
7. NBC v. United States, 319 U.S. 190, 213 (1943).
8. FCC, Public Service Responsibility of Broadcast Licensees (1946).
9. FCC, Report and Statement of Policy re: Commission en banc Programming Inquiry, 44 F.C.C. 2303 (1960).
10. Ibid., p. 2314.
11. Ibid., p. 7294.
12. Local TV Journalism (Special Report) Broadcasting 37-85, July 25, 1983.
13. News Staffing: Size Holds Steady, 110 Broadcasting 115, March 24, 1986.
14. See Mark S. Fowler and Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Texas Law Review 207 (1982).

15. Mark S. Fowler, The Public's Interest, 4 Communication and the Law Quarterly Review, 51 (1981).
16. Fowler and Brennen, Ibid., p. 208.
17. Facing Off on Scarcity, 108 Broadcasting, 66, April 22, 1985.
18. See Stanley M. Bensen and Robert W. Crandall, The Deregulation of Cable Television, 44 Law and Contemporary Problems, 79 (1981).
19. National Association of Broadcasters, Comments of the National Association of Broadcasters, 10-11, and Appendix A (A Cost/Benefit Analysis of the FCC's Ascertainment and Program Log Requirements).
20. Deregulation Report and Order, Ibid., pp. 14-15.
21. NBC v. United States, Ibid.
22. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969) (Case upheld Fairness Doctrine).
23. Ibid.
24. 453 U.S. 367 (1981).
25. Note. The Future of Content Regulation in Broadcasting, 69 Calif. L. Review, 555, 576 (1981).
26. See FCC v. WNCN Listener's Guild, 450 U.S. 582 (1981). Ruling that Commission's decision to ease regulations concerning radio station's format was not contrary to the public interest standard mandated by Communications Act because FCC provided rational basis for its conclusion that reliance on market forces would promote diversity which would be in public interest.
27. Compare Red Lion, 395 U.S. 367 (1969) which upheld Fairness Doctrine with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) holding Florida "personal attack" reply statute for newspapers unconstitutional.
28. 412 U.S. 94, 126 (1973).